In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1496

DISTRICT 30, UNITED MINE WORKERS OF AMERICA, AND LOCAL 8280, UNITED MINE WORKERS OF AMERICA, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–13a) is reported at 422 F. 2d 115. The Board's decision and order (Pet. App. 22a–31a) are reported at 166 NLRB No. 271.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13a–14a) was entered on December 29, 1969, and a petition for rehearing was denied on January 28, 1970 (Pet. App. 21a). The petition for a writ of certiorari was filed on April 28, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a union, in order to justify picketing which on its face is violative of Section 8(b)(7)(A) of the National Labor Relations Act, may rely on past unfair labor practice conduct engaged in by the employer which the Board would be barred from considering directly because it occurred beyond the six-month period prescribed in Section 10(b) for filing an unfair labor practice charge.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in the Appendix to the petition (Pet. App. 51a–55a).

STATEMENT

On February 24, 1964, the Blue Diamond Coal Company gave notice to petitioners, District 30 and Local 8280, United Mine Workers of America (UMW), of its desire to terminate the collective bargaining agreement covering its Leatherwood No. 1 Mine and to negotiate a new one (Pet. App. 23a).[1] Blue Diamond and UMW met six times in bargaining sessions, but they could not reach a new agreement. On April 27, 1964, when the current contract expired, the approximately 160 employees then on the payroll

[1] UMW had been the Board-certified representative of the employees at Leatherwood No. 1 since January 1964, and had been recognized without a certification prior to that time (Pet. App. 22a). Two other mines owned by Blue Diamond were represented by the Southern Labor Union (R. 55a–56a). "R." references are to the appendix to the parties' briefs in the court below.

ceased work, causing mining operations to shut down (Pet. App. 23a).

On August 11, 1964, Blue Diamond notified the employees by letter that it intended to reopen the mine and that employees who did not return by August 24 would be replaced. Upon receipt of the letter, approximately 200 employees came to the mine and, represented by the president of Local 8280 and three committeemen, asked the mine superintendent to discuss the terms on which they could return to work. The superintendent said that he would "talk to them as individuals but not as a group." Finding that unacceptable, the employees left (Pet. App. 23a; R. 268a-273a).

In November 1964, Blue Diamond resumed operations with a work force of approximately 120 men, of whom 28 were returning employees (Pet. App. 23a-24a). In January 1965, after it learned that operations had resumed at the mine, Local 8280 held a meeting, at which it was decided to picket the mine because it "was the bargaining agent up there. We had an election and we had chosen the United Mine Workers to bargain for us" (Pet. App. 38a). Picketing began on January 19, 1965, with signs reading that UMW and Local 8280 had no contract at the mine (Pet. App. 24a).[2]

On April 30, 1965, Southern Labor Union (SLU) demanded recognition at Leatherwood No. 1 on the basis of 120 authorization cards signed by the em-

[2] The picketing continued, with one interruption, until July 13, 1965, when it was enjoined by the district court in a proceeding brought by the Board's Regional Director under Section 10(*l*) of the Act (Pet. App. 24a).

ployees. Blue Diamond compared the signatures on the cards with those in its personnel files, and, after authenticating 115 cards, advised SLU that its recognition demand was accepted.[3] At the same time, Blue Diamond wrote to UMW stating: "You are hereby notified that Blue Diamond Coal Co. is convinced that the United Mine Workers of America no longer represents a majority of our employees at our Leatherwood Mine * * *" (Pet. App. 39a-40a). On May 5, 1965, Blue Diamond and SLU, after approximately 16 hours of negotiations, entered into a collective agreement for a three-year term (Pet. App. 24a; R. 317a).

UMW continued its picketing and, on December 7, 1965, SLU filed an unfair labor practice charge alleging that the picketing was for a recognitional objective and thus violated Section 8(b)(7)(A) of the Act (R. 1a). The Regional Director issued a complaint, and thereafter obtained a temporary injunction under Section 10(*l*) (see note 2, *supra*).

On the basis of these facts, the Board held that, on and after April 30, 1965, UMW had picketed the Leatherwood No. 1 mine for a recognitional purpose at a time when SLU was the bargaining representative of Blue Diamond employees and the contract between SLU and Blue Diamond precluded raising a question concerning representation, and that therefore such picketing violated Section 8(b)(7)(A) of the Act (Pet. App. 24a, 26a). In so concluding the Board

[3] A previous request for recognition by SLU in January or February 1965 had been denied on the ground that it did not then represent a majority of the employees (Pet. App. 38a).

reversed the Trial Examiner, who had found that the recognition of SLU was unlawful on the ground that, since the Company committed an unfair labor practice in August 1964 when it refused to bargain with UMW concerning the return to work of the striking employees, the latter became unfair labor practice strikers who could not be permanently replaced. Since the Company's alleged unfair labor practice occurred more than six months prior to the filing of the charge herein and thus Section 10(b) of the Act would have barred the Board from assessing that conduct directly,[4] the Board, following its earlier ruling in *Roman Stone Construction Co.*, 153 NLRB 659, held that the time-barred event could not properly be used as a basis for impeaching the Company's contract with SLU, which was "valid on its face and of reasonable duration, [and hence] would be a bar to a representation petition" (Pet. App. 26a). The Board ordered UMW to cease and desist its unlawful picketing, and to post appropriate notices (Pet. App. 28a–29a).

The court of appeals sustained the Board's decision and enforced its order (Pet. App. 1a–13a). Relying on *Local Lodge No. 1424, Machinists (Bryan Mfg. Co.)* v. *National Labor Relations Board*, 362 U.S. 411 (discussed *infra*, pp. 7–8), the court concluded that the principle enunciated therein "prevents the resurrection of legally defunct unfair labor practices in the guise of evidence and the resultant subversion of the

[4] Section 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board * * *."

policies promoted by the limitations provisio of section 10(b)," and that to "permit [UMW] to invoke the company's putative unfair labor practices in this case as a defense to the unlawful picketing charge would be directly contrary to this rule" (Pet. App. 12a).

ARGUMENT

The decision of the court of appeals is clearly correct and, contrary to petitioners' contentions, is not in conflict with any other decision. There is thus no occasion for further review.

Section 8(b)(7)(A) of the Act proscribes picketing by a union where "an object" thereof is to force or require an employer "to recognize or bargain" with that union where he "has lawfully recognized * * * any other labor organization and a question concerning representation may not appropriately be raised under section 9(c)." On the facts here (*supra*, pp. 2–4), it is clear that at least an object of the UMW's picketing was to secure recognition and bargaining rights from the Company, and that it engaged in this picketing at a time when the Company had a contract which, on its face, required it to recognize SLU for a three-year term, and thus would have barred a representation petition under Section 9(c) of the Act. Accordingly, all the elements of a violation of Section 8(b)(7)(A) are present here, unless UMW can show, as it attempted to, that the Company's recognition of SLU was unlawful. However, to make such a showing would require establishing that the Company committed an

unfair labor practice more than six months prior to the filing of the charge herein.[5]

In *Local Lodge No. 1424, Machinists (Bryan Mfg. Co.)* v. *National Labor Relations Board*, 362 U.S. 411, this Court held that, where "a collective bargaining agreement and its enforcement are both perfectly lawful on the face of things, and an unfair labor practice cannot be made out except by reliance on the fact of the agreement's original unlawful execution, an event which, because of limitations, cannot itself be made the subject of an unfair labor practice complaint," the policies underlying Section 10(b) would preclude converting "what is otherwise legal into something illegal" (*id.* at 419). Although *Bryan Mfg. Co.* involved the question whether the employer had violated Section 8(a)(1) and (2), and the union Section 8(b)(1)(A) and (2), of the Act by entering into an exclusive recognition contract, with a union security clause, at a time when the union did not represent a majority of the employees, the same principle is equally applicable here. As the Board explained in *Roman Stone Construction Co., supra*, 153 NLRB at 659, n. 3:

> Section 8(b)(7)(A) * * * was intended in part to promote stability in established bargaining relationships, an interest also served both by the contract-bar rules and by Section 10(b). To hold, under the conditions presented herein,

[5] Blue Diamond first refused to deal with UMW as the representative of the employees in August 1964 (*supra*, p. 3). A timely charge testing that refusal would have had to have been filed by February 1965 (see note 4, *supra*). The charge on which the present proceeding is based was filed in December 1965 (*supra*, p. 4).

> that an incumbent union's representative status may be placed in issue as a defense to 8(b)(7)(A) charges would permit a rival union to accomplish by means of picketing what it could not achieve under established Board procedures. Such an application of 8(b)(7)(A) would offend the very policy which that Section was designed to further. Consistent with the congressional scheme, it is our opinion that the term "lawfully recognized" was meant to include all bargaining relationships immune from attack under Sections 8 and 9 of the Act. Accordingly, and as [the contracting union's] representative status could not be litigated under any other Section of the Act, we [hold] that such testimony could not be adduced in the 8(b)(7)(A) proceeding for the purpose of collaterally attacking [the contracting union's] status as statutory bargaining representative. * * **

Contrary to petitioners' claim (Pet. 18–19), the fact that UMW was originally certified as the representative of the Company's employees does not require a contrary conclusion. Although the majority status of a certified union is presumed to continue after the expiration of the certification year, that presumption can be rebutted by objective factors showing that the union has in fact lost its majority status. The Company's resumption of operations with almost an entirely new work force, coupled with SLU's

* As the court below succinctly stated, the Board here properly determined that, "[b]ased on its holding in *Roman Stone*, * * * the UMW could not employ Blue Diamond's alleged unfair labor practice as a shield when section 10(b) barred its use as a sword" (Pet. App. 8a).

subsequent showing of a card majority which was verified by the Company (*supra*, pp. 3–4), were sufficient to undermine the continuing vitality of UMW's original certification. Nor is there substance to petitioners' contention (Pet. 23–24) that Section 10(b) should be tolled because the Company's relationship with SLU was concealed from UMW. It was the Company's refusal to deal with UMW as the representative of the returning strikers which affords the principal basis for challenging the Company's recognition of SLU, and that refusal was clearly communicated to the UMW officials who accompanied the strikers (*supra*, p. 3).[7]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7] On April 30, 1965, the company also notified UMW by letter that it no longer considered it the representative of its employees (*supra*, p. 4).

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